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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 254

ARGONAUT SAVINGS AND LOAN ASSOCIATION, a corporation, and CITY SAVINGS AND LOAN ASSOCIATION, a corporation,

Petitioners,

vs.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of San Francisco National Bank,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari

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FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of San Francisco National Bank,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari

PRELIMINARY STATEMENT

This is the brief of respondent Federal Deposit Insurance Corporation, as receiver of San Francisco National Bank,[1] in opposition to the petition for a writ of certiorari.

This case concerns the construction of a written lease. SFNB was the lessee. Petitioners hold the lessor's interest.

1. In this brief San Francisco National Bank will be called "SFNB" or "the bank," and Federal Deposit Insurance Corporation in its capacity as receiver of SFNB will simply be called "FDIC."

Aproximately eighteen months after the lease was made, SFNB was declared insolvent and closed by the Comptroller of the Currency. FDIC was appointed SFNB's receiver. After being appointed receiver, FDIC continued to occupy the leased premises and paid the rental for approximately six months. FDIC then exercised its right as receiver to disaffirm the lease. Five months later, petitioners declared the lease terminated and sued FDIC for the unexpired term of the lease.

The District Court granted FDIC's motion for summary judgment. The Court of Appeals affirmed. Both courts held that under the language of the lease FDIC was as a matter of law not liable for the unexpired term of the lease.

That decision does not call for the attention of this Court. It is simply a matter of the interpretation of the lease. The decision is consistent with several cases reaching the same result. And the decision is consistent with the intent of Congress. The holding is both legally correct and equitable.

In this brief, we will show that the decision is consistent with other cases, with the intent of Congress, and with equity. We will answer petitioners' arguments, and will show that they do not present any issue to be decided by this Court.

The basic point is this: this case simply involves the interpretation of a lease, and the lower courts' interpretation is consistent with present law and is correct.

STATEMENT OF FACTS

Because we believe that petitioners' statement of facts is defective, we respectfully submit respondent's statement. The facts appear in the complaint and in the affidavit of Mr. Melville B. Bennett.[2]

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2. Tr., page 1, page 28.

In 1963 Mr. Don C. Silverthorne, SFNB's president, leased certain premises[3] to the bank under a written lease for twenty-five years. On the same day, Silverthorne assigned his rights as lessor to petitioners. On January 22, 1965, SFNB was closed for insolvency by the Comptroller of the Currency and FDIC was appointed the bank's receiver.[4] On June 28, 1965, FDIC notified petitioners that it was disaffirming the lease effective July 31, 1965, and on the designated date FDIC relinquished possession of the premises to petitioners.

Petitioners' complaint was filed approximately five months later. The complaint included a notification by petitioners that under the options given to them in paragraph 15(c) of the lease, they were electing to terminate the lease. Petitioners asked for damages for the unexpired term of the lease.

THE DISTRICT COURT AND COURT OF APPEALS HELD THAT FDIC WAS NOT LIABLE FOR THE UNEXPIRED TERM OF THE LEASE

Petitioners make several erroneous statements about what they contend are the issues in the case. It is therefore important to note precisely what the lower courts decided.

They held that under the language of the lease FDIC was as a matter of law not liable for the unexpired term of the lease. The Court of Appeals' opinion expressly referred to the language of the lease. It then said that under the language of that lease:

> ". . . the lessor was not entitled to judgment because his claim had not accrued and become unconditionally fixed on or before the date when the bank was declared

3. Not the main bank office.

4. FDIC must be the receiver for all closed national banks, 12 U.S.C. § 1821(c).

> insolvent . . . . The bank was declared insolvent on January 22, 1965; the appellants did nothing to exercise the option given them by the lease until December 14, 1965, nearly eleven months later. The appellants did not have, on January 22, 1965, the claim that they now assert."

Therefore, petitioner's claim for the unexpired term of the lease was not a valid claim against the bank's receiver; 12 USC § 194.

The decision of the lower court is simple: under the language of the lease, FDIC is not liable for the unexpired term of the lease. This was the only thing decided. And it was correct.

THE DECISION IS LEGALLY CORRECT AND IS EQUITABLE

The Decision is Consistent with Other Cases.

The decision of the District Court and the Court of Appeals is consistent with cases previously decided.

Innumerable cases hold that for a claim to be enforceable against an insolvent national bank receivership, it must be accrued and unconditionally fixed on or before the date the bank becomes insolvent.[5] And more specifically, two cases are precisely in point with the present case. They

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5. *First Nat. Bank of Selma v. Colby*, 88 U.S. 609, 612-614 (1875); *Scott v. Armstrong*, 146 U.S. 499, 511 (1892); *Davis v. Elmira Savings Bank*, 161 U.S. 275, 289-290 (1896); *Dakin v. Bayly*, 290 U.S. 143, 148-149 (1933); *Merchants' Nat. Bank v. School Dist. No. 8*, 94 Fed. 705, 709 (9th Cir. 1899); *Citizens' Bank & Trust Co. v. Thornton, et al.*, 174 Fed. 752, 762-763 (5th Cir. 1909); *Steele v. Randall*, 19 F.2d 40 (8th Cir. 1927); *Fouts v. Maryland Casualty Co.*, 30 F.2d 357 (4th Cir. 1929), cert. den., 279 U.S. 852 (1929); *Gamble v. Wimberly*, 44 F.2d 329, 332-333 (4th Cir. 1930); *Douglass v. Thurston County*, 86 F.2d 899, 909-910 (9th Cir. 1936); *Fash v. First Nat. Bank of Alva*, 89 F.2d 110 (10th Cir. 1937); and *Dinan v. First Nat. Bank of Detroit*, 117 F.2d 459, 461-462 (6th Cir. 1941), cert. granted, 314 U.S. 593 (1941); cert. dismissed 315 U.S. 824 (1942).

are *Kennedy v. Boston-Continental National Bank*, 84 F.2d 592 (1st Cir. 1936), and *Boston-Continental National Bank v. Wendell Phillips Co.*, 84 F.2d 599 (1st Cir. 1936). The identity of the two *Boston-Continental* cases to the present case was noted in the Court of Appeals' opinion. We will not here repeat the facts or opinions of the two cases. However, their identity to the present case is easily demonstrated. In each case:

(1) There was a lease to a national bank which became insolvent and went into receivership;

(2) The lease was thereafter disaffirmed by the bank's receiver and was then terminated by the lessor;

(3) The claimed damages were for the unexpired term of the lease;

(4) The claim was based on a clause in the lease which provided for liquidated damages in the event of termination of the lease by the lessor for breach by the lessee; and

(5) The court held that the receiver was not liable to the lessor for the unexpired term of the lease.

The Decision Is Consistent With the Intent of Congress.

Congress has indicated its approval of the *Boston-Continental* holdings in favor of national bank receivers.

Congress amended the *bankruptcy* statute regarding the liability of a *bankrupt's* receiver for the unexpired portion of the *bankrupt's* lease; 11 USC § 103. However, Congress made no similar amendment to the National Bank Act regarding *national bank* leases.[6] Congress thereby expressed

6. National banks and their receiverships are not subject to the provisions of the Bankruptcy Act. They are regulated under the separate statutory system of the National Bank Act; *Cook County National Bank v. United States*, 107 U.S. 445 (1882); *Hulse v. Argetsinger*, 18 F.2d 944 (2nd Cir. 1927); *Dinan v. First National Bank of Detroit, supra.*

its intent to leave in effect the holding of the *Boston-Continental* cases as applied to national bank receiverships.

In addition, since the *Boston-Continental* cases Congress has amended the National Bank Act several times.[7] However, it made no amendment regarding the liability of a national bank's receiver for the unexpired term of a lease. This is another expression of Congress' approval of the *Boston-Continental* holdings.

The Decision Is Equitable.

The decision of the Court of Appeals does not create any unfair precedent for landlords. The decision is simply a matter of construction of this particular lease.

Petitioners participated in the formation of the lease; when the lease was executed, it was immediately assigned to petitioners. The *Boston-Continental* holdings had been in effect for over twenty-five years when this lease was made. Petitioners therefore had the opportunity to negotiate the language of the lease if they did not like its provisions regarding possible insolvency of the lessee.

Parties can in the future simply use different language to define the landlord's rights upon the insolvency of a national bank lessee. The decisions in this case and in the *Boston-Continental* cases do not bar landlords from preparing their leases to preserve a right to damages against the receiver of a national bank. The opinion in the *Kennedy* case stated that if the lease had provided that insolvency was a breach and without further action the lease would terminate and the lessor be entitled to damages, that claim would be binding against the bank's receiver.

We would finally note that petitioners have received their property back. And as contended by the petitioners, that

7. See Title 12, USCA.

property was improved from its condition at the beginning of the lease.

PETITIONERS' ARGUMENTS DO NOT SHOW ANY GROUND FOR THE PETITION

We will now reply to petitioners' arguments. We will show that they do not raise any issue to be decided by this Court.

Petitioners argue that FDIC had no power to disaffirm the lease and dispose of an "asset" of the bank. However, the cases are well settled that the receiver of a national bank does have the power to disaffirm leases. The Court of Appeals noted those cases in its opinion: *Kennedy v. Boston-Continental, supra; Boston-Continental v. Wendell Phillips, supra; Dinan v. First National Bank of Detroit, supra; Buhl Land Company v. Kavanaugh,* 131 F.Supp. 136 (E. D. Mich. 1954), affirmed 223 F.2d 265 (6th Cir. 1955); *Fidelity Safe Deposit & Trust Company v. Armstrong,* 35 Fed. 567 (C.C.S.D. Ohio 1888). Further, FDIC is not disposing of an "asset"; it is defending a claimed *liability.* Petitioners are not contributing money to the bank's estate; they are trying to take away $600,000 that will otherwise be distributed to depositors.

Petitioners next argue that the bank's insolvency and the receiver's disaffirmance breached the lease. The simple answer to this argument is that that is not what the lease says. Under the lease, petitioners were not entitled to liquidated damages until *they elected to terminate* the lease and reenter. Since they did not do so until long after insolvency and disaffirmance, their claim was not absolute and unconditional at the date of insolvency. And petitioners' argument is also answered by the *Boston-Continental* cases and *Dinan v. First National Bank of Detroit, supra.*

Petitioners imply[8] that there is some conflict in the circuits. However, there is no conflict. The cases cited by petitioners do not pertain to receiverships of national banks. National bank receiverships are governed by their own body of law,[9] and the cases dealing with national banks are consistent with the present decision.

Petitioners argue that the U. S. Supreme Court granted certiorari in the *Kennedy* case. We do not know the Court's reason for granting certiorari, or why the petition was abandoned. But regardless of what reason may have existed then, there is no reason now. The *Boston-Continental* decisions have stood for over thirty years. And as stated above, those decisions have received the approval of Congress in amendments which Congress has made to the Bankruptcy Act and the National Bank Act. And the Court of Appeals' opinion in this case noted the absence of recent decisions as an indication of the success of the measures taken to strengthen the banking system. Whatever reason may have existed for granting certiorari in 1936 does not exist today.

Petitioners make the bald assertion that it appears *without issue* that rent for the months of December 1964 and January 1965 was not paid.[10] The assertion is erroneous. Respondent affirmatively denied nonpayment on lines 3 and 4 of page 23 of its appellee's brief. Petitioners' authority for this assertion is an affidavit which has already been materially modified because of errors.[11] The error of petitioners' assertion is demonstrated by the letter which is set forth in full in the appendix to this brief. That letter,

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8. Page 13 of their petition.
9. See footnote 6, supra.
10. Petition, pp. 4, 14.
11. Tr., pp. 55-56.

acknowledging the December and January payments, was signed by the prior counsel for petitioners and should have been brought to the attention of their present counsel. Further, petitioners' complaint demonstrates both the error of the argument and that it is irrelevant to this action. The complaint did *not* seek any alleged unpaid rental for December or January. Instead, it sought only liquidated damages for the loss of anticipated rents during the unexpired term after July, 1965.

Finally, petitioners assert that there are some questions of fact. However, it is apparent that all of the material facts in the case are acknowledged: the making of the lease; the language of the lease; the insolvency of the bank; the disaffirmance of the lease by FDIC; and the later termination of the lease by petitioners. These are the only material facts, and they are uncontested.

The decision of the lower courts is simply the application of long-established law to those admitted facts.

CONCLUSION

The lower courts decided just one thing. That is, that under the provisions of this lease FDIC was as a matter of law not liable for the unexpired term of the lease.

The decision of the lower courts is correct. It is consistent with prior cases; it is consistent with the intent of Congress; it is based simply upon a construction of this particular lease; and it is equitable.

It is therefore respectfully submitted that the petition for writ of certiorari should be denied.

Dated: July 24, 1968.
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(Appendix follows)